erty belongs ultimately to the shareholders,[25] and on them rest the corporate liabilities.[26] Policy holders are mere creditors, between whom and the company there exists not even a trust relationship.[27] No support can be found for the theory of the dissenting opinion that the mere enormity of the amounts due the creditors, as compared with the capital of the company, overturns these established principles. Cases cited by the court sanctioning the changing of a mutual into a stock company[28] are distinguishable, for the voting right taken in these cases was one in which it is not clear that the policy holders, who were deprived of it, had a property right. The case, then, must, in the last analysis, rest upon the mutualization clause in the original charter. The provision therein that the business should be conducted on the "mutual plan" is of slight importance as it would not in itself mean more than that the premiums should constitute a fund for the payment of losses.[29] The clause giving the directors power to enfranchise policy holders may perhaps be sufficient to sustain the result reached. But this clause, though a limitation upon the stockholders' right, authorized the enfranchisement only of those holding insurance to the amount of $5,000. It is difficult to see how the legislature could alter the limitation without substantially impairing property rights. The statute can be upheld only upon a most liberal interpretation of the clause in question, overruling the construction placed upon it by decisions rendered at an earlier stage of the litigation,[30] not directly involved in this appeal.

THE DETERMINATION OF CLASSES.—Seemingly a gift to the children of a person means to all his children. But the fact that the will speaks as of the testator's death, or that distribution is directed at some specified time, together with the aversion of the courts to delay in distribution, has led to various rules for determining when the class shall be closed. It may be stated generally that all members of such a class born before the time of distribution are included. When there is a direct gift of personalty, only those living at the testator's death take,[1] but if there are then no children, all, whenever born, are admitted.[2] The authorities are divided as to whether after-born children can ever be admitted where there is a devise of realty, but the better view seems to be that the same rule should apply to realty as to personalty.[3] When the gift is of a fixed

[25]Martin *v.* N. F. P. Mfg. Co. *et al.* (1890) 122 N. Y. 165, 172; Matter of Petition Argus Co. (1893) 138 N. Y. 557, 569.

[26]N. Y. Ins. Law §§ 41, 42.

[27]Everson *v.* Equitable Life Assur. Co. (1895) 61 Fed. 258; aff'd (1896) 71 Fed. 570; Pierce *v.* Equitable Life Assur. Soc. (1887) 145 Mass. 56; Berley *v.* Equitable Life Assur. Soc. (N. Y. 1881) 61 How. Pr. 344; Greeff *v.* Equitable Life Assur Soc. (1899) 160 N. Y. 19.

[28]Grobe *v.* Erie etc. Co. (N. Y. 1899) 39 App. Div. 183; Wright *v.* Minn. Ins. Co. (1904) 193 U. S. 657; Polk *v.* Mut. Res. Ass. (1807) 207 U. S. 310.

[29]Union Ins. Co. *v.* Hoge (1858) 21 How. 35, 64.

[30]Lord *v.* Equitable etc. Soc. (N. Y. 1905) 109 App. Div. 252; aff'g. 47 Miscel. 187. On the subject generally, see 17 Green Bag 353.

[1]Viner *v.* Francis (1789) 2 Cox 190. In Kentucky, after-born children share unless an intention to exclude is manifest. Lynn *v.* Hall (1897) 101 Ky. 738.

[2]Weld *v.* Bradbury (1715) 2 Vern. 705; Andrews *v.* Partington (1791) 3 B. C. C. 401.

[3]Theobald, Wills (6th Ed.) 303, 4.

sum to each, the death of the testator closes the class, even though it is not payable until they are twenty-one.[4] In fact, such a gift is not a class gift.[5] When the gift or devise is of a remainder, the time of payment or division determines the class, as there is no inconvenience to the estate in allowing this longer period while it is in the process of settlement.[6] Whether the remainder is vested or contingent generally affects only the share of each member;[7] if vested, all who become members of the class take; if contingent, only those living at the time of division. If the time of distribution is dependent upon some contingency, the determination of the class involves a reconciliation of the testator's apparently conflicting intentions that all the children shall take and that distribution shall be made at a particular time. Thus, if a gift is to children when they attain twenty-one, the rule is that the class is closed when the eldest attains that age.[8] Since a different result might theoretically be attained by giving to each member on majority a share partially defeasible by the advent of a member, the rule seems to be one of convenience. Supposing the gift to be vested, the class is most conveniently determined when the eldest reaches or would have reached, the required age.[9] It has been argued, however, that a proper time is when the eldest child reaches, or dies before reaching, the required age, because the postponement of distribution is probably introduced so that the legatee may reach the age of discretion: if he dies sooner, there is no reason why the share should not be immediately paid to his representatives.[10] But this result loses sight of the fact that in any case distribution at the majority of the eldest compels a disregard of the intention that all should wait until the age of discretion, and, since the terms of the gift do not require the payment of his share at his death, there is no reason for further ignoring that intention. If distribution is to occur when the youngest attains a designated age, the class is closed when all the children living at any one time have reached that age.[11] This rule is conceded to be one of convenience. But additional provisions for maintenance or advancement take the case without its operation.[12] In both cases the inconvenience to the courts of delaying distribution seems the same. Apparently in the latter the additional provisions are deemed to raise an inference of intent to include every child, sufficient to overcome such a consideration. Where the reasons for the preceding rules cease, as in the case of a gift of income at twenty-one, they are not applied. The distribution of income is periodical, and the amount of the shares can be determined at each such period anew, if necessary.[13] While such an exception apparently applies as well where the gift is direct, it has been

[4]Storrs *v.* Benbow (1833) 2 My. & K. 46; Ringrose *v.* Bramham (1794) 2 Cox 384.

[5]9 COLUMBIA LAW REVIEW 368.

[6]Devisme *v.* Mellor (1782) 1 B. C. C. 537; Oppenheim *v.* Henry (1853) 10 Hare 441.

[7]Ridgway *v.* Underwood (1873) 67 Ill. 419.

[8]Gilmore *v.* Severn (1785) 1 B. C. C. 582.

[9]Maher *v.* Maher (1877) 1 L. R. Ir. 22.

[10]Kales, Fut. Int. §230.

[11]Gooch *v.* Gooch (1851) 14 Beav. 565; Hughes *v.* Hughes (1807) 14 Ves. 256; cf Handberry *v.* Doolittle (1865) 38 Ill. 203.

[12]Mainwaring *v.* Beevor (1849) 8 Hare 44; *In re* Courtenay (1905) 74 L. J. Ch. 654.

[13]*In re* Wenmoth's Estate (1887) 37 Ch. D. 266; *In re* Averill, L. R. [1898] 1 Ch. 523.

held that the ordinary rule there governs, and that after-born children may not be admitted.[14] In this last case, however, the court appears to have been laboring to sustain a gift over, otherwise invalid under the rule against perpetuities.

There is one line of cases, not beyond criticism, in which the courts refuse to apply the general rule making the time of distribution determinative—where the gift over is to the "heirs" or "next-of-kin." Influenced by the technical meaning of the terms,[15] they deem the testator to have intended the property to go as if he had died intestate. While this construction is reasonable where the first devisee or his representatives could not take as the representatives of the testator, where he is one of the heirs or next-of-kin, its appropriateness is doubtful. It may be true that ordinarily the testator may have no definite idea of the effect of the gift, but merely intended to prevent intestacy. But it is reasonable to infer that, having provided for one branch of the family, as is the usual case, in the prior disposition, he had no intention that its members should also take as representatives. And where, as often happens, there is a gift to a child and in default of children to the testator's representatives, for the sole purpose of keeping the property from the child's representatives, the orthodox construction plainly reaches an unreasonable result.[16] On the other hand, it is difficult to see how the determination of the class at the time of distribution would in any way defeat the testator's purposes. While it is argued that there is no presumption against the testator's capriciousness or improvidence, it may be answered that there is no reason for construing an ambiguous provision to work a capricious result. Nevertheless, though by other means the testator may guard against such a result,[17] his intention must be made plain. Thus a gift to the "then" next-of-kin is effective[18] only when it cannot mean "thereupon,"[19] and the use of the future tense in describing the class is never sufficient.[15]

The supreme test of the favor of the court for this technicality comes when, as in a recent case, *Bond* v. *Moore* (1908) 236 Ill. 576, the life tenant or first taker is the *sole* "heir" or "next-of-kin." A testatrix gave a life-estate to her son, but should he die without issue, the estate to go to her nearest relatives. The son was the sole next-of-kin at the death of the testatrix. It was held that this fact was sufficient to postpone the determination of the class until the end of the life-estate. While it is probable that in the United States such would generally be the result,[20] certainly if a fee is first given to be divested in favor of the next-of-kin on some contingency,[21] in England, though the earlier cases favored this rule,[22] the latest case[23] has gone to the length of disregarding the combined inferences arising from this fact, the use of a future tense in describing the

[14] *In re* Powell, L. R. [1898] 1 Ch. 227.
[15] Holloway *v.* Holloway (1830) 5 Ves. 399; Starr *v.* Newberry (1857) 23 Beav. 436.
[16] Bird *v.* Luckie (1850) 8 Hare 301.
[17] Sturge *v.* Ry. Co. (1881) 19 Ch. D. 444.
[18] Wharton *v.* Barker (1858) 4 K. & J. 483; Proctor *v.* Clark (1891) 154 Mass. 45.
[19] Cable *v.* Cable (1853) 16 Beav. 507; Bullock *v.* Downes (1860) 9 H. L. C. 1.
[20] Johnson *v.* Askey (1901) 190 Ill. 58.
[21] Welch *v.* Brimmer (1897) 169 Mass. 204.
[22] Miller *v.* Eaton (1815) G. Coop. 272; Jones *v.* Colbeck (1802) 8 Ves. 38.
[23] *In re* Wilson [1907] 1 Ch. 450.

class, and other beneficial provisions which would possibly postpone the distribution until after the death of the life-tenant. Some of the American cases seem to turn on whether the remainder is vested or contingent, favoring the later time for closing the class when contingent.[24] An examination of the Massachusetts cases shows that each is decided on its own particular facts.[25] Such considerations as a slight consequent practical difficulty in distribution,[26] or the violation of the rule against perpetuities by a provision later than the one under consideration in case the death of the life-tenant is taken as the proper time[27] may influence the court adversely. It is submitted, however, that the principal case is correct, though it relies on the one inference only, and that on principle this is the reasonable result in accordance with the more probable intention of the testator.[28]

EFFECT OF AN UNREGISTERED TRANSFER OF STOCK.—With regard to the effect of an unregistered transfer of stock where the governing statute, charter, or by-laws of the corporation, provide that the stock shall be transferable only on the books, a variety of conclusions have been reached. A distinction could with propriety be drawn between such a provision contained in the governing statute and a like provision in the by-laws, since, in the former case, it might be construed as a legislative restriction on the assignability of the shares, while, in the latter, it would merely form part of the contract between the corporation and its shareholders, of which a creditor, or purchaser from the transferor, could not take advantage.[1] But this distinction does not seem generally to have been observed by the courts.[2] It must also be noticed that, in all jurisdictions, the transfer is complete as between the parties, no matter what the nature of the title acquired by the transferee.[3] The question is only of importance when the rights of third parties are involved.

It is impossible to support the view that registration is a necessary condition to the passing of any title whatsoever, since in no jurisdiction where the purchaser or attaching creditor of the transferor has notice of the prior transfer will his rights be protected,[4] a result which assumes the acquisition by the prior transferee of some rights as against third parties. Perhaps the most generally accepted theory is that the provision in question is a restriction on the assignability of the legal title to stock, and that the transferee acquires an equitable title merely.[5] This view explains the protection afforded to a *bona fide* purchaser from the transferor. But a complete acceptance of it involves difficulties. The interest

[24]Johnson *v.* Askey, *supra;* Delaney *v.* McCormack (1882) 88 N. Y. 174.

[25]Cf. Welch *v.* Brimmer, *supra;* Heard *v.* Read (1897) 169 Mass. 216.

[26]Rotch *v.* Rotch (1899) 173 Mass. 125.

[27]Rand *v.* Butler (1880) 48 Conn. 293.

[28]*Contra,* cf. 2 Jarman, Wills (2nd Am. Ed.) 676.

[1]Cf. Blanchard *v.* Dedham etc. Co. (Mass. 1858) 12 Gray 213, with Sargent *v.* Essex etc. Ry. Co. (Mass. 1829) 9 Pick. 202.

[2]Oxford Turnpike Co. *v.* Bunnel (1827) 6 Conn. 552.

[3]Johnson *v.* Laflin (1878) 5 Dill. 65, at 79.

[4]Cheever *v.* Meyer (1879) 52 Vt. 66; Burse Live Stock Co. *v.* Range V. C. Co. (1897) 16 Utah, 59.

[5]Otis *v.* Gardner (1885) 105 Ill. 436; Lippitt *v.* American Wood Paper Co. (1885) 15 R. I. 141; Fisher *v.* Bank (Mass. 1855) 5 Gray 373.